IN THE

# Supreme Court of the United States

OCTOBER TERM, 1939

No. 138

Z. M. McCARROLL, COMMISSIONER OF REVENUES OF THE STATE OF ARKANSAS ..... *Appellant,*

v.

DIXIE GREYHOUND LINES, INC. ..... *Appellee.*

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

## BRIEF OF APPELLANT

With Appendix

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## SUBJECT INDEX


| | Page |
|---|---|
| Opinions below | 1 |
| Statement as to jurisdiction | 1 |
| Statement of the case | 4 |
| The statutes in question | 4 |
| The evidence | 5 |
| Jurisdictional amount | 9 |
| Assignment of errors | 11 |
| Summary of argument | 13 |
| Argument | 15 |
| I. The tax required by the statutes in question is levied for the privilege of using the highways. The Circuit Court of Appeals so held as its own conclusion in following the decision of the Supreme Court of Arkansas in *Sparling* v. *Refunding Board*, 189 Ark. 189, 71 S. W. 2d 182. The decision of the Supreme Court of Arkansas is controlling | 15 |
| II. Act 67 of 1933 is fair and reasonable. It provides a necessary means of enforcing the gasoline tax; and the means used are within the State's constitutional power | 18 |
| A. It imposes no burden on appellee even while appellee is conducting its operations in the manner appellee deems most convenient | 18 |
| B. The inconvenience and expense shown by the evidence to be occasioned appellee by the enforcement of Act 67 do not amount to an unconstitutional burden on appellee. The convenience of the individual using the highways as his place of business must yield to the power of the state to select its own methods for collecting compensation for the use of its highways | 23 |
| C. Act 67 can be sustained independently of other grounds as an easily administered aid in the enforcement of the state gasoline tax even though it may work a hardship in some cases. It effects a "reasonable margin to insure effective enforcement" | 28 |
| III. The reasons assigned by the Circuit Court of Appeals for its decision are sufficient to overthrow Act 67 of 1933 | 30 |
| A. Act 67 does not impose a tax upon gasoline which is carried through Arkansas for use in other states | 30 |
| B. The Court misunderstood and misapplied *Interstate Transit Inc.*, v. *Lindsey*, 283 U. S. 183 | 33 |
| C. Act 67 does not burden commerce carried on in other states | 38 |
| D. Act 67 does not open the door to the principle of the cumulative taxation of the same interest by more than one state | 39 |
| IV. *Bingham* v. *Golden Eagle Western Lines*, 297 U. S. 626, is direct authority to sustain Act 67 of 1933 | 41 |
| Conclusion | 42 |
| Appendix A, Act 11 (part) of the Acts of the Second Extraordinary Session of the 49th General Assembly of Arkansas of 1934, page 28 | 43 |


### CASES CITED


Aero-Mayflower Transit Co. v. Georgia Public Service Comm., 295 U. S. 285 — 24, 28, 30, 32, 36, 40

Aero-Mayflower Transit Co. v. Georgia Public Service Comm., 179 Ga. 431, 176 S. E. 487 — 24, 40

## SUBJECT INDEX—Continued


| | Page |
|---|---|
| Alexander v. Cosden Co., 290 U. S. 484 | 15 |
| Bayside Fish Flour Co. v. Gentry, 297 U. S. 422 | 17 |
| Bingaman v. Golden Eagle Western Lines, 297 U. S. 626 | 14, 17 |
| Burnet v. Wells, 289 U. S. 670 | 17, 30 |
| Carley & Hamilton v. Snook, 281 U. S. 66 | 24, 25, 32 |
| Clark v. Paul Gray, Inc., 306 U. S. 583 | 2, 10, 17 |
| Clark v. Poor, 274 U. S. 554 | 25, 37 |
| Continental Baking Co. v. Woodring, 286 U. S. 352 | 25 |
| Curry v. McCanless, 307 U. S. 357 | 39 |
| Euclid v. Ambler Realty Co., 272 U. S. 365 | 17, 29 |
| Hebe Co. v. Shaw, 248 U. S. 297 | 17 |
| Hendrick v. Maryland, 235 U. S. 610 | 30 |
| Hicklin v. Coney, 290 U. S. 169 | 17, 25, 30, 33, 36 |
| Holyoke Water Power Co. v. American Writing Paper Co., 300 U. S. 324 | 17 |
| Interstate Busses Corp. v. Blodgett, 276 U. S. 245 | 35 |
| Interstate Transit, Inc. v. Lindsey, 283 U. S. 183 | 31, 37, 38 |
| Jacob Ruppert v. Caffey, 251 U. S. 264 | 29 |
| Kane v. New Jersey, 242 U. S. 160 | 30 |
| Kentucky Whip & Collar Co. v. Illinois Central R. R. Co., 299 U. S. 334 | 17 |
| Lambert v. Yellowley, 272 U. S. 581 | 29 |
| Milliken v. United States, 283 U. S. 15 | 17, 29 |
| Morf v. Bingaman, 298 U. S. 407 | 34, 36, 37 |
| New York v. Hesterberg, 211 U. S. 31 | 17 |
| Pierce Oil Corp. v. Hope, 248 U. S. 498 | 17 |
| Purity Extract & Tonic Co. v. Lynch, 226 U. S. 192 | 17, 29 |
| South Carolina State Highway Department v. Barnwell Bros., 303 U. S. 177 | 15, 25 |
| Sparling v. Refunding Board, 189 Ark. 189, 71 S. W. 2d 182 | 13, 15, 33 |
| Sproles v. Binford, 286 U. S. 374 | 24 |
| State v. Hicklin, 168 S. C. 440, 167 S. E. 674 | 36 |
| United States v. Carolene Products Co., 304 U. S. 144 | 17 |
| Western Live Stock v. Bureau of Revenue, 303 U. S. 250 | 40 |


### STATUTES CITED


| | |
|---|---|
| Act 67 of the Acts of the 49th General Assembly of Arkansas of 1933, Regular Session, page 194 | 4, 11, 13, 14, 15, 18, 19, 20, 21, 23, 29, 40, 41 |
| Act 11 (part) of the Acts of the Second Extraordinary Session of the 49th General Assembly of Arkansas of 1934, page 28 (Appendix A) | 4, 5, 11, 15, 16, 17, 18, 19, 33 |
| Constitution of the United States, Commerce Clause, Art. I, Sec. 8, Cl. 3 | 2, 11 |

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## BRIEF OF APPELLANT

With Appendix

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### Opinions Below

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit is reported in 101 F. 2d 572 (R. 67). The opinion of the United States District Court for the Eastern District of Arkansas is reported in 22 F. Supp. 985 (R. 28).

### STATEMENT AS TO JURISDICTION

Statement as to jurisdiction was filed as required by Rule 12, and probable jurisdiction was noted on October 9, 1939.

This is an appeal under Section 240 (b), Judicial Code, 28 U. S. C. 347 (b), from a final judgment of the United States Circuit Court of Appeals for the Eighth Circuit, holding certain statutes of the State of Arkansas to be invalid because repugnant to the Commerce Clause (Art. I, Sec. 8, cl. 3) of the Constitution of the United States. The plaintiff in the District Court, appellee here, sued to enjoin enforcement of such statutes, alleging conflict with the Commerce Clause and an amount in controversy exceeding $3,000 (R. 1). Neither temporary restraining order nor temporary injunction were sought (R. 23-24). The District Court, one judge sitting, held the statutes valid and dismissed the complaint, 22 F. Supp. 985 (R. 28). The Circuit Court of Appeals reversed the District Court, holding the statutes invalid under the Commerce Clause, 101 F. 2d 572 (R. 67). This action was begun in the District Court on October 31, 1934 (R. 1), hence the Act of August 21, 1937, 50 Stat. 738, does not apply, *Clark v. Paul Gray, Inc.*, 306 U. S. 583, 586. The amount in controversy exceeds $3,000, in that the evidence shows that if the statutes are valid appellee will, by reason thereof, be required to pay to the state in the regular and usual operation of its busses more than $3,000 annually in gasoline taxes. *Clark* v. *Paul Gray, Inc., supra.* Recital of the facts showing such jurisdictional amount is an integral and necessary part of the general statement of the case, so to avoid repetition that recital will be made in such statement.

The last paragraph of the decision of the Circuit Court of Appeals is the following:

> "The decree appealed from is reversed and the court below is directed to enter a decree in favor of the appellant, enjoining the appellee from enforcing the

challenged tax against it with respect to all gasoline in the fuel tanks of its interstate busses which is being carried through Arkansas for use in other states."

The effect of that is to prevent appellant from enforcing the statutes in question, at least as to appellee. These statutes require appellant to collect the state gasoline tax on all gasoline in excess of twenty gallons brought into the state in the fuel tanks of motor vehicles. The evidence shows that there is always a substantial quantity of gasoline in excess of twenty gallons in the fuel tanks of appellee's busses, while in Arkansas, which will be used in other states (R. 49-50). The command of the statutes is to collect the tax on all such excess. Appellant is thus restrained from enforcing the law as the legislature enacted it. The very least that can be said of the court's decision is that it held the statutes partially unconstitutional, but the actual result is to invalidate them entirely and render them unenforceable.

## STATEMENT OF THE CASE

### The Statutes in Question

The statutes in question are Act 67 of the Acts of the 49th General Assembly of Arkansas of 1933, Regular Session, page 194; and part of Act 11 of the Acts of the Second Extraordinary Session of the 49th General Assembly of Arkansas of 1934, page 28 (Appendix "A").

Act 67 of 1933 is the following:

"An Act to Better Enforce the Gasoline Tax, and for other Purposes.

"Be It Enacted by the General Assembly of the State of Arkansas:

"Be It Enacted by the People of the State of Arkansas:

"Section 1. On and after the passage of this Act it shall be a violation of the law for any person, co-partnership or company to drive or cause to be driven into the State of Arkansas any automobile or truck carrying over twenty (20) gallons of gasoline in the gasoline tank of such automobile or truck or in auxiliary tanks of said trucks to be used as motor fuel in said truck or motor vehicles until the state tax thereon has been paid.

"Section 2. Any person, co-partuership or company violating the provisions of this Act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not exceeding one hundred ($100) dollars. Each load carried into the state shall constitute a separate offense.

"Section 3. All laws and parts of laws in conflict herewith are hereby repealed. It is ascertained

that this Act is necessary to better enforce the gasoline collection laws and said Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is hereby declared to exist and this Act shall take effect and be in full force from and after its passage.

"Approved: March 2nd, 1933."

Act No. 11 (Appendix "A") fixes the amount of the tax at six and one-half cents per gallon.

Thus the combined effect of the two statutes is to require a person driving a motor vehicle into the state to pay the tax of six and one-half cents per gallon on all gasoline in excess of twenty gallons in the fuel tanks of the vehicle.

## The Evidence

The evidence consists of the affidavits, admitted by stipulation, of two officials of appellee (R. 44). Certain allegations of appellee's complaint which were admitted by appellant's answer will also be referred to here.

Appellee is a corporation engaged as a common carrier of passengers for hire by motor bus in interstate and intrastate commerce, and has appropriate authority from the Interstate Commerce Commission and various state regulatory commissions. It operates in and through various states, including Tennessee, Arkansas and Missouri (R. 45). The routes it follows in and through Arkansas are shown in the upper right-hand corner of the map of the north-

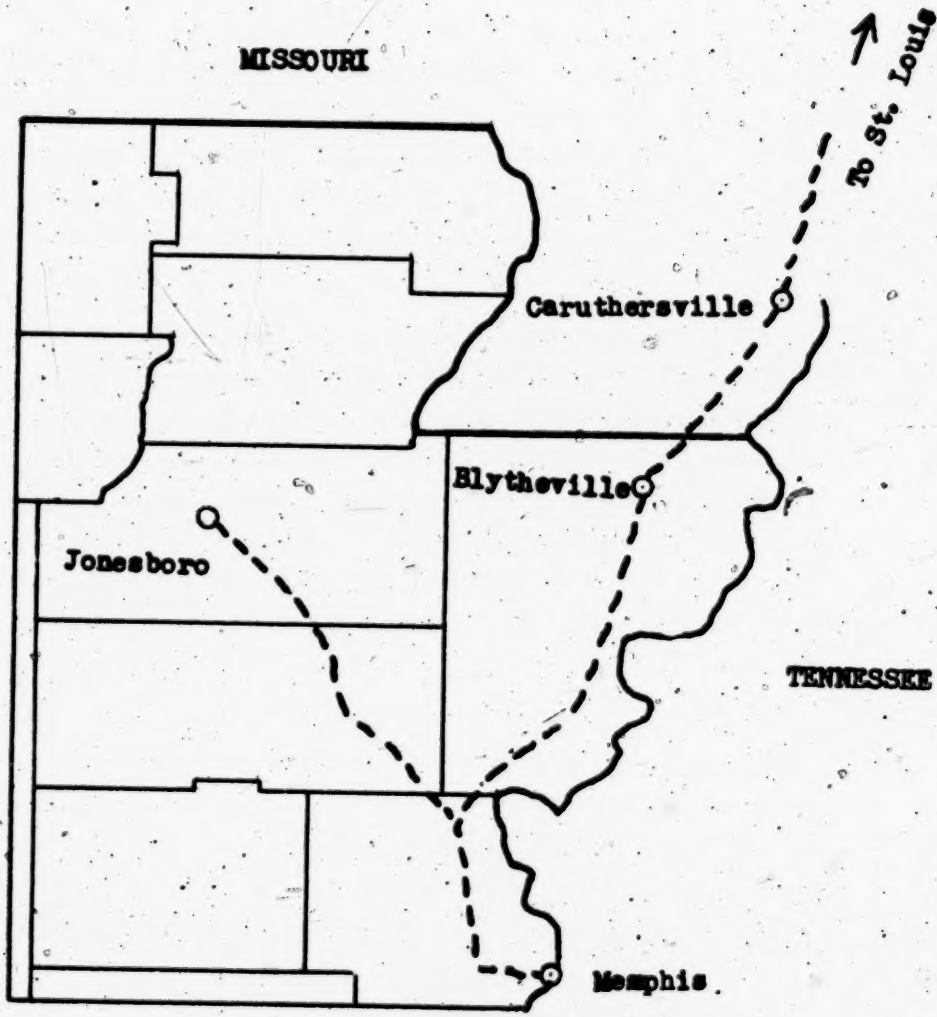
eastern part of Arkansas shown on opposite page, and its detailed operations over such routes are the following; numbered only for convenience in reference:

(1) Between Memphis, Tennessee, and St. Louis, Missouri. This operation begins at Memphis, crosses the Mississippi River into Arkansas, parallels the course of the river north through Blytheville, Arkansas, to the northern boundary of Arkansas, and then proceeds in a northerly direction (diverting several miles to enter Caruthersville, Missouri) to St. Louis. Three miles are in Tennessee, 77.9 miles in Arkansas, and 261.8 miles in Missouri, a total of 342.7 miles. The route follows U. S. Highway No. 70 in Memphis, Tennessee, and for a few miles westward in Arkansas to West Memphis, and thence northerly on U. S. Highway No. 61 to St. Louis (R. 46). Three scheduled trips are made daily in each direction (R. 51).

(2) Between Memphis, Tennessee, and Blytheville, Arkansas, over the same highways. Three miles are in Tennessee, and 71.4 miles are in Arkansas (R. 46). Two scheduled trips are made daily in each direction (R. 51).

(3) Between Memphis, Tennessee, and Caruthersville, Missouri, over the same highways. Three miles are in Tennessee and 77.9 miles are in Arkansas. One scheduled trip is made daily in each direction (R. 15, 51, 46). Caruthersville is 105.2 miles from Memphis (R. 50).

(4) Between Memphis, Tennessee, and Jonesboro, Arkansas. This operation follows the routes of the first three operations on U. S. Highways 70 and 61 to the junction point at Turrell, Arkansas, and then follows U. S. Highway 63 northwest to Jonesboro, Arkansas. Three miles are in Tennessee and 70 miles in Arkansas (R. 46).




PART OF NORTHEAST ARKANSAS

- - - - indicates bus routes



Two scheduled trips are made daily in each direction (R. 51).

In each of these operations appellee carries both interstate and intrastate passengers in the same busses. Interstate passengers very greatly predominate in number and percentage of ticket sales. All of the cities and towns on these routes, in addition to those named above, are served (R. 47).

The busses average approximately five miles for each gallon of gasoline consumed (R. 49, 25). On the Memphis to Jonesboro, Arkansas, busses; on the Memphis to Blytheville, Arkansas, busses; and on the Memphis to Caruthersville, Missouri, busses, appellee puts enough gasoline in the fuel tanks at Memphis to enable the busses to travel from Memphis to such points and return to Memphis, with a reasonable margin of safety. The Memphis to St. Louis busses are fueled only at Memphis and St. Louis (R. 49, 50).

Appellee is a very large user of gasoline, using 1,259,401 gallons in 1935. The cost of such gasoline at the refinery and the transportation charges and taxes thereon constitute one of the principal elements in the total cost of furnishing transportation (R. 47).

Appellee's witnesses further testified by such affidavits that it has been found, through years of experience, that the only economical, safe, practicable and reliable method of obtaining and handling gasoline requires the maintenance by the operating company of storage facilities capable of storing gasoline in large quantities. Such facilities must be large enough to permit the purchase and storage of gasoline in carload or barge load quantities be-

cause gasoline may be purchased in such quantities direct from the producers at lower cost than in smaller quantities. Such storage facilities should not be more numerous than absolutely necessary in order to save investment and expense. Such storage facilities should be located at strategic points with reference to the routes traversed by the motor busses and where water transportation is available, not only by reason of the fact that water transportation is cheaper in itself, but also because the availability of water competition tends to reduce competitive railroad rates. It is also necessary that appellee exercise supervision over the quality and grade of gasoline used by it in order to control cost of operation. It is impracticable from an accounting and operating point of view to permit the casual purchase of gasoline for the use of a bus in the course of a journey. Variation from such proper operating practices increases the cost of fuel and causes delays which increase the cost of transportation to the public, and injures appellee by causing inferior service. Filling fuel tanks at roadside filling stations constitute a fire risk. There is no point within the State of Arkansas on any of the routes traversed by appellee which offers advantages for the purchase and storage of gasoline or where the acquisition or maintenance of storage facilities would not prove to be a useless expense to the company. Appellee pays to the State of Tennessee a tax of 7c per gallon and an additional inspection fee of four mills per gallon on all gasoline placed by it in storage in its facilities in Memphis, Tennessee; whether such gasoline is used within the State of Tennessee or not, the fact of storage in that state making such gasoline liable for the tax. Appellee also pays to the State of Missouri a tax of 3c per gallon on all gasoline placed by it in storage

in its facilities in that state, whether such gasoline is used in the State of Missouri or not. Every gallon of gasoline which is carried into the State of Arkansas in the tanks of a motor bus owned by appellee has been taxed by, and the tax paid to, either the states of Tennessee or Missouri (R. 47-50).

Appellee's witnesses further testified that the interstate rates of appellee are under regulation of the Interstate Commerce Commission and its intrastate rates are under regulation of the various public utilities regulatory boards of the various states, the intrastate rates in Arkansas being under the supervision of the Arkansas Corporation Commission. In practice, rates are proposed by appellee in the form of filed tariffs, the regulatory boards having the right to suspend such rates if they so desire (R. 52-53).

## JURISDICTIONAL AMOUNT

A bus which moves from Memphis to St. Louis, on the route designated above as (1), travels 339.7 miles after crossing the Tennessee Arkansas boundary (R. 46). It must therefore have in its fuel tanks at such crossing at least 68 gallons of gasoline (339.7 ÷ 5 = 68). Of course it has more as a reserve supply. Considering only this 68 gallons, however, there are in the fuel tanks of each Memphis-St. Louis bus as it enters Arkansas at least 48 gallons of gasoline subject to the tax of 6.5 cents under the statutes in issue here, a total of $3.12. Three trips are made daily, making a total of $9.36 tax for the daily one-way operation from Memphis to St. Louis. This alone is sufficient to establish the necessary jurisdictional amount as more than $3,000 "would normally be collected during

the period of the litigation," *Clark* v. *Paul Gray, Inc.*, 306 U. S. 583, 589. The usual course of a suit from District Court through the Circuit Court of Appeals and the Supreme Court could hardly require less than a year. This amount is increased, however, by the other operations. On the return trip from St. Louis to Memphis, as the bus has only 80.9 miles to travel after crossing the Missouri-Arkansas boundary, it may not be carrying more than 20 gallons of gasoline as it can make the trip on 17 gallons; hence for jurisdictional purposes that will not be considered.

In the operations designated above as (2), (3), and (4), the busses are fueled only at Memphis and make round trips from and to that point (R. 49, 50). The busses carry a reserve supply (R. 50) but for present purposes we need not estimate its amount. In operation (2) a bus travels 71.4 miles from the Tennessee-Arkansas line to Blytheville, Arkansas, and return, and 3 miles in Memphis, a total of 145.8 miles after entering Arkansas. Two trips are made daily, 291.6 miles, requiring 58 gallons of gasoline, 18 gallons being subject to the tax, which is $1.17. In operation (3) a bus travels 207.4 miles for the round trip after entering Arkansas. That requires 40 gallons of gasoline of which 20 is subject to the tax totaling $1.30. Only one trip is made. In operation (4) a bus travels a round trip of 143 miles after entering Arkansas, requiring 29 gallons of gasoline. Two trips are made, making 18 gallons subject to the tax of $1.17.

That makes a total daily tax from all four operations of $13.00, computing only the minimum amount of gasoline necessary to propel the vehicles the required mileage, and without allowing for any reserve supply.

## ASSIGNMENT OF ERRORS

1.

The court erred in holding that Act 67 of the General Assembly of Arkansas of 1933, page 194, violates the Commerce Clause, Article 1, Section 8, Clause 3, of the Constitution of the United States.

2.

The court erred in holding that said Act 67 of the Acts of the General Assembly of Arkansas of 1933, page 194, and Section 22 of Act 11 of the Second Extraordinary Session of the General Assembly of Arkansas of 1934, page 28, violate the Commerce Clause, Article 1, Section 8, Clause 3, of the Constitution of the United States, or the Fourteenth Amendment to the Constitution.

3.

The court erred in holding said acts unconstitutional, because the evidence shows (a) that on some of the company's routes the busses can be and are operated during the entire time while in Arkansas on less than twenty gallons of gasoline, and (b) that on all of the routes said busses can be so operated that all of the gasoline in the fuel tanks in excess of twenty gallons at the time the busses enter Arkansas will be consumed in Arkansas.

4.

The court erred in holding that inconvenience which may be suffered by Dixie Greyhound Lines, Inc., in complying with said acts affords a sufficient ground for declaring said acts unconstitutional.

5.

The court erred in holding said acts unconstitutional, because said acts afford a necessary and practical and valid means of collecting the gasoline tax from interstate motor vehicle operators using the state's highways.

6.

The court erred in holding said acts unconstitutional, because in their practical operation they do not necessarily require a motor vehicle operator to pay a tax upon gasoline he uses in another state.

7.

The court erred in holding that because of the plan of carrying on its business adopted by Dixie Greyhound Lines, Inc., said acts are unconstitutional.

8.

The court erred in holding said acts unconstitutional on the ground that they impose a tax upon gasoline used in other states.

9.

The court erred in holding that said acts impose an unconstitutional burden upon interstate commerce.

10.

The court erred in holding that the facts that the acts may require a motor vehicle operator to pay to Arkansas the Arkansas tax upon gasoline which such operator uses in another state renders the acts unconstitutional.

## SUMMARY OF ARGUMENT

### I.

The tax required by the statutes in question is levied for the privilege of using the highways. The Circuit Court of Appeals so held as its own conclusion in following the decision of the Supreme Court of Arkansas in *Sparling v. Refunding Board*, 189 Ark. 189, 71 S. W. 2d 182. The decision of the Supreme Court of Arkansas is controlling.

### II.

Act 67 of 1933 is fair and reasonable. It provides a necessary means of enforcing the gasoline tax; and the means used are within the State's constitutional power.

A. It imposes no burden on appellee even while appellee is conducting its operations in the manner appellee deems most convenient.

B. The inconvenience and expense shown by the evidence to be occasioned appellee by the enforcement of Act 67 do not amount to an unconstitutional burden on appellee. The convenience of the individual using the highways as his place of business must yield to the power of the State to select its own methods for collecting compensation for the use of its highways.

C. Act 67 can be sustained independently of other grounds as an easily administered aid in the enforcement of the State gasoline tax even though it may work a hardship in some cases. It effects a "reasonable margin to insure effective enforcement."

### III.

The reasons assigned by the Circuit Court of Appeals for its decision are insufficient to overthrow Act 67 of 1933.

A. Act 67 does not impose a tax upon gasoline which is carried through Arkansas for use in other States.

B. The Court misunderstood and misapplied *Interstate Transit, Inc.* v. *Lindsey*, 283 U. S. 183.

C. Act 67 does not burden commerce carried on in other States.

D. Act 67 does not open the door to the principle of the cumulative taxation of the same interest by more than one State.

## IV.

*Bingaman* v. *Golden Eagle Western Lines*, 297 U. S. 626, is direct authority to sustain Act 67 of 1933.

## ARGUMENT

### I.

### THE TAX REQUIRED BY THE STATUTES IN QUESTION IS LEVIED FOR THE PRIVILEGE OF USING THE HIGHWAYS.

The Circuit Court of Appeals held that the tax required by the two statutes is imposed as compensation for the privilege of using the highways. This appears to be its own independent conclusion, but it also followed the opinion of the Supreme Court of Arkansas in *Sparling* v. *Refunding Board*, 189 Ark. 189, 71 S. W. 2d 182, which so held as to Act 11 of 1934.

In the courts below appellee vigorously insisted (1) that the Supreme Court of Arkansas did not in *Sparling* v. *Refunding Board* hold that Act 11 of 1934 imposes a tax for the privilege of using the highways, and (2) that even if it did so hold, that decision is not binding on the Federal Courts.[1] Because of appellee's position we give some attention to the point here.

We submit that it is altogether obvious: (1) that Act 11 of 1934 and Act 67 of 1933, either separately or together impose a tax for the privilege of using the highways; (2) that this question was clearly decided and settled by the decision of the Supreme Court of Arkansas in *Sparling* v. *Refunding Board*, *supra*, and that the Court there held that Act 11 of 1934, imposes a tax for the privilege of using the highways; and (3) that the decision of

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[1] Appellee did not seek a review of that part of the decision of the Circuit Court of Appeals holding that the tax is imposed for the privilege of using the highways. Compare *Alexander* v. *Cosden Co.*, 290 U. S. 484, 487; *South Carolina State Highway Department* v. *Barnwell Bros.*, 303 U. S. 177, 184.

the Supreme Court of Arkansas will be accepted as final by this Court.

In *Sparling* v. *Refunding Board, supra,* certain parties using gasoline for other purposes than propelling motor vehicles sought (1) to have Act 11 of 1934 construed to exempt them from the tax, or (2) if Act 11 should not be so construed, to have it declared violative of the Arkansas Constitution. The following is the substance of the Court's opinion on this point:

Prior to 1934, one using gasoline for other purposes than propelling motor vehicles on the public highways could obtain a refund of the tax paid, but Act 11 discontinued such refunds. The refunds had reached the excessive proportions of $553,596.36 out of a total tax of $6,542,024.79 in 1933. Perhaps from 50 to 90 per cent of the refunds were fraudulent. The purpose of the legislature in doing away with the refunds was to improve the collection of the gasoline tax by eliminating the principal means of evading it. *The tax is imposed for the privilege of using the highways; the imposition of the tax upon non-highway uses does not change the character of the tax but is only for the purpose of facilitating the collection of the tax.*

Summarizing its position, the Court said in the last paragraph of its opinion:

> "Let it be definitely understood that the tax imposed is not a property tax, but it is a privilege tax for the use of the highways, and that the legislature has declared the public policy of the State to be to tax all gasoline sold or used in this State for such purpose in order to prevent fraud and imposition on the State in the sale or use of a comparatively negligible quantity for other purposes."

That part of the Court's opinion which holds that a gasoline tax for the privilege of using the highways can be imposed upon users for non-highway purposes as a means of preventing evasion appears to be supported by decisions of this Court.[2] But if that particular conclusion were erroneous, and if the question were now before this Court, such error would not in any way militate against the Arkansas court's holding that the tax is imposed for the privilege of using the highways. The only result of the error would be to release from the tax users of gasoline for non-highway purposes. This is self-evident and likewise appears from the dissenting opinion in *Sparling* v. *Refunding Board, supra.* Furthermore, if such question were before this Court appellee, whose use of gasoline is for highway purposes, would have no standing to raise it. *Clark* v. *Paul Gray, Inc.*, 306 U. S. 583, 595-596.

The express decision of the Supreme Court of Arkansas that the tax imposed by Act 11 of 1934 is a charge for the privilege of using the highways will be accepted by this court as final. *Hicklin* v. *Coney*, 290 U. S. 169, 172; *Bingaman* v. *Golden Eagle Western Lines*, 297 U. S. 626, 628. In the latter case a New Mexico statute made gasoline brought into the State in the fuel tanks of motor vehicles subject to the gasoline tax, but no exemption of any amount was allowed. This Court said:

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[2] *Purity Extract & Tonic Co.* v. *Lynch*, 226 U. S. 192, 201; *New York* v. *Hesterberg*, 211 U. S. 31, 40; *Milliken* v. *United States*, 283 U. S. 15, 24-25; *Burnet* v. *Wells*, 289 U. S. 670, 678; *Bayside Fish Flour Co.* v. *Gentry*, 297 U. S. 422, 426; *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 388; *United States* v. *Carolene Products Co.*, 304 U. S. 144, 151; *Holyoke Water Power Co.* v. *American Writing Paper Co.*, 300 U. S. 324, 341; *Kentucky Whip & Collar Co.* v. *Illinois Central R. R. Co.*, 299 U. S. 334, 353; *Hebe Co.* v. *Shaw*, 248 U. S. 297, 303; *Pierce Oil Corp.* v. *Hope*, 248 U. S. 498, 500.

> "The case turns upon the question of whether the pertinent statutory provisions exact a charge as compensation to the State for the use of its highways, or impose an excise tax for the use of an instrumentality of interstate commerce. If the former, the tax should be sustained; if the latter, it clearly contravenes the commerce clause, and must be held bad."

This Court then found that the Supreme Court of New Mexico had held the tax not to be one for the privilege of using the highways but to be an excise on the general use of gasoline. The Court held that it was bound by this construction.

In the instant case there is the same main question, the Arkansas statute being more favorable to the taxpayer, however, in allowing the 20 gallons exemption; and the Supreme Court of Arkansas has held the tax to be imposed for the privilege of using the highways. It is submitted that the tax is levied for the privilege of using the highways and that *Bingaman v. Golden Eagle Western Lines, supra,* indicates that it is valid.

## II.

## ACT 67 OF 1933 IS FAIR AND REASONABLE. IT PROVIDES A NECESSARY MEANS OF ENFORCING THE GASOLINE TAX; AND THE MEANS USED ARE WITHIN THE STATE'S CONSTITUTIONAL POWER.

A. The purpose of the statutes and the practical necessity for them are plain. The State of Arkansas has a large system of paved roads, including those used by appellee. It is evident from a reading of Act 11 of the Special Session of 1934 (Appendix "A") that the gasoline

tax is of vital necessity in paying for and maintaining them, including retirement of highway bonds. The terms of Act 11 show that it is a revised continuation of legislation begun in 1927 and before; and the various successive legislative acts all have been directed, in part, to better collection of the gasoline tax. All of the proceeds of the tax are pledged to use for highway purposes. (Secs. 2, 23 (e).) The legislature pledges to maintain the annual revenue from gasoline taxes and motor vehicle license fees at $8,537,000.00. (Sec. 48.)

The necessity for Act 67 of 1933 in a plan of highway financing so dependent upon the gasoline tax is apparent. Appellee's arguments only more forcibly demonstrate the propriety of the tax. Appellee operates a regular daily total of 1,188.8 bus miles upon the Arkansas highways,[3] and unless Act 67 can be enforced against it appellee will pay no gasoline tax to the State. Were there no improved highways appellee could not operate its busses 1,188.8 miles daily in the State, yet appellee objects to paying to the State whose highways it uses the gasoline tax which makes such highways possible.

Appellee's objection to that, and its principal objection to the tax, is that the form of Act 67 is such that compliance with it is so burdensome that the Act violates the Commerce Clause. Appellee's entire showing of burdensomeness is confined to allegation and proof that it is cheaper and more convenient to store in Memphis and St. Louis, gasoline to be used in operating busses through

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[3] Route (1), 3 trips daily each way over 77.9 miles = 467.4 miles. Route (2), 2 trips daily each way over 71.4 miles = 285.6 miles. Route (3), 1 trip daily each way over 77.9 miles = 155.8 miles. Route (4), 2 trips daily each way over 70 miles = 280 miles. Total, 1,188.8 miles (R. 46, 47, 51).

Arkansas, than to store such gasoline in Arkansas or elsewhere; and that Act 67 burdens the storage of gasoline in Memphis and St. Louis.

It is submitted that Act 67 is valid on its face and that appellee's claims and the evidence adduced to support them are of no materiality. It seems evident as a matter of law that the exemption of twenty gallons provides a sufficient practical, working margin to enable a motor vehicle operator to avoid payment of an excessive tax to Arkansas, and to further avoid, by the exercise of ordinary care, duplication in payment of the tax to other States. And certainly that is all that the taxpayer is entitled to demand, particularly where he uses the improved Arkansas highways as a place to conduct his business.

However, we will now submit, by an analysis of appellee's own evidence, that such evidence of itself establishes the validity of the act. As above stated, we think the act is valid on its face and that an examination as to its effect upon particular individuals is not relevant. But since appellee's evidence does illustrate, by the effect of the Act upon appellee, that the Act does operate fairly, we make a brief analysis of it here. And that analysis may have some value, as a laboratory experiment, in demonstrating, as is the purpose of elementary laboratory experiments, the correctness of a well known general truth.

As has been stated, appellee operates a regular daily total of 1,188.8 bus miles in Arkansas. At five miles per gallon this requires 237.76 gallons of gasoline, upon which the Arkansas tax at 6.5 cents would be $15.45.

It cannot be maintained that appellee cannot be required to pay the amount of gasoline tax needed for the

actual mileage of its operations on the Arkansas highways. However, as has been shown above in the discussion of the jurisdictional amount, appellee can carry on its present plan of operations, maintaining gasoline supply only at Memphis and St. Louis, and otherwise conducting its business as it likes, and still comply with Act 67 and pay a minimum of $13.00 in daily gasoline taxes. As has been made clear, this figure of $13.00 does not allow for a reserve supply, but is based upon the mathematically required amount of gasoline, at 5 miles per gallon, needed to operate the busses from the time they enter Arkansas until they arrive at either Memphis or St. Louis. But at that it is $2.45 less than the tax upon the gasoline required for the actual daily bus mileage in Arkansas.

We shall now analyze further the effect of Act 67 upon appellee while appellee is carrying on its present method of operation. Our purpose is to show: (1) the actual amount of gasoline consumed on the portions of each route which lie entirely in Arkansas, and the tax which would be required upon such gasoline; (2) the amount of tax which Act 67 would require appellee to pay on each route under appellee's present operating plan, assuming a certain reserve supply to be carried; and (3) the comparison of the amounts of the tax obtained by such computations.

As has been shown above, the operation designated for reference as (1), Memphis to St. Louis and return, has 3 miles in Tennessee, 77.9 miles in Arkansas, and 261.8 miles in Missouri; total, 342.7 miles (R. 46). If a northbound bus leaves Memphis with 78 gallons of gasoline it will have 10 left on arrival at St. Louis. The tax will be paid on 58 gallons when entering Arkansas, $3.77. A south-

bound bus leaving St. Louis with 78 gallons will travel 261.8 consuming 52.4 gallons, before reaching Arkansas. On entering Arkansas 25.6 gallons will be left in the tank and the tax will be paid on 5.6 gallons, 37 cents. Thus the total tax cost for one round trip, carrying ten gallons reserve each way, will be $4.14. The round-trip mileage wholly in Arkansas is 155.8, requiring 31.6 gallons of gasoline on which the tax would be $2.06. This leaves a "loss" of $2.08 for appellee, but as will be shown this "loss" is made up by "gains" on the other routes.

In operation (2), Memphis, Tennessee, to Blytheville, Arkansas, and return, a bus is fueled only at Memphis. After crossing the Arkansas line it travels 71.4 miles to Blytheville, returns back to the line, and travels 3 miles in Memphis to destination. Of this route 142.8 miles are in Arkansas, requiring 28.56 gallons of gasoline on which the tax would be $1.86. Only 6 miles of the round trip are not in Arkansas (R. 46, 51). Appellee could start the trip with 35 gallons, and could complete it with a reserve supply of 5 gallons left. Fifteen gallons would be taxed on entering Arkansas, for 98 cents. Thus, as appellee now conducts its business it can comply with Act 67 and save 88 cents in taxes on each round trip on this route over the value of the tax on the amount of the gasoline it actually uses on the Arkansas highways.

On operation (3) it is 210.4 miles from Memphis to Caruthersville, Missouri, and return. Of this 155.8 miles are in Arkansas, requiring a gasoline tax of $2.06 (R. 15, 46, 50, 51). The total amount of gasoline required for the round trip is 42 gallons. Appellee could enter Arkansas

with 50 gallons and pay a tax of $1.95 on 30 gallons for the round trip, thus saving 11 cents in taxes.

On operation (4) it is 146 miles from Memphis to Jonesboro, Arkansas, and return, of which 140 miles are in Arkansas requiring a tax of $1.82 (R. 46, 51). Twenty-nine gallons of gasoline are required for the round trip. Appellee could enter Arkansas with 35 gallons and pay a tax on 15 gallons of 98 cents, with a saving of 84 cents.

Summarizing these computations, we have the following for one round trip on each of appellee's routes:

| Route | Amount of tax which would be required on gasoline actually consumed in Arkansas. | Amount of tax which would be paid by appellee under its present operating plan while carrying the assumed reserve gasoline supply. |
|---|---|---|
| (1) | $2.06 | $4.14 |
| (2) | 1.86 | .98 |
| (3) | 2.06 | 1.95 |
| (4) | 1.82 | .98 |
| Total | $7.80 | $8.05 |

These computations would be changed by assuming a smaller or larger reserve supply. But they demonstrate that Act 67 works no hardship on appellee or any other operator. It is to be noted particularly that the discrepancy with respect to route (1) is caused by the fact that appellee runs a bus from Memphis to St. Louis, 342.7 miles, without refueling. If appellee changed its refueling plan it could operate without any "loss." If it now refueled at Caruthersville, Missouri, as it did when this action was begun (R. 6, 14, 49), it would be the gainer. We shall devote some attention to that point later herein.

B. We have been justifying Act 67 by showing that it imposes no hardship upon appellee while appellee is con-

ducting its operations as it desires, with gasoline storage facilities only at Memphis and St. Louis. But it is of course obvious that it is not necessary to go to that extent to sustain the Act. The convenience of the individual using the highways as his place of business must yield to the power of the State to select its own methods for collecting compensation for the use of its highways. *Aero-Mayflower Transit Co. v. Georgia Public Service Comm.*, 295 U. S. 285, 289; *Carley & Hamilton* v. *Snook*, 281 U. S. 66, 72; *Sproles* v. *Binford*, 286 U. S. 374, 388-389, 390, 391. The *Aero-Mayflower* case presents a close analogy to our own. The statute in issue there required a flat fee of $25.00 per year for each vehicle operated by a contract carrier. In the lower court, as shown by the opinion of the Supreme Court of Georgia (179 Ga. 431, 176 S. E. 487), plaintiff, a non-resident, complained that during a year it was required to operate 60 trucks into the State of Georgia wholly in interstate commerce, but that each truck made only occasional and infrequent trips into the State, and that the cost of licensing the sixty trucks at $25 each, $1,500, for the actual amount of highway use plaintiff obtained, was an excessive burden on interstate commerce. Answering that the Supreme Court of Georgia said (179 Ga., p. 442, 176 S. E. p. 493):

> "The fact that a flat rate is charged for each motor vehicle does not, without more, furnish ground for a charge of discrimination, nor does it furnish ground of such charge as applied to the plaintiff as a private carrier exclusively in interstate commerce, operating many motor vehicles which interchangeably come into this State at intervals. A motor vehicle provided with the prescribed license could operate over the highways of the State continuously, *and the plaintiff should adjust the movements of its motor ve-*

*hicles to the requirements of the law.*" (Emphasis supplied.)

This court affirmed the judgment of the Supreme Court of Georgia upholding the statute, and said:

> "The appellant urges the objection that its use of roads in Georgia is less than that by other carriers engaged in local business, yet they pay the same charge. The fee is not for the mileage covered by a vehicle. *There would be administrative difficulties in collecting on that basis.* The fee is for the privilege for a use as extensive as the carrier wills that it shall be. There is nothing unreasonable or oppressive in a burden so imposed. Cf. *Clark* v. *Poor*, 274 U. S. 554, and *Hicklin* v. *Coney*, 290 U. S. 169, *supra.*" (Emphasis supplied.)

In *Carley & Hamilton* v. *Snook*, *supra*, this Court said (281 U. S., p. 72):

> "A corollary of this contention is that although the fees are not *per se* disproportionate to the privilege of operating over all the highways of the State, appellants are nevertheless entitled to receive licenses limiting the operation of their motor cars to the few highways which they wish to use, upon the payment of correspondingly reduced fees. But no constitutional principle is suggested, and we know of none which would enable a licensee thus to regulate the extent of the privilege granted or to assail an otherwise valid tax upon it merely because a reduction of the privilege and the tax would better suit his convenience or his pocketbook."

That case involved intrastate commerce, but that difference is not material, *South Carolina State Highway Department* v. *Barnwell Bros.*, 303 U. S. 177, 184-191; and see *Continental Baking Co.* v. *Woodring*, 286 U. S. 352, 373,

where *Carley & Hamilton* v. *Snook* is cited in a case involving interstate commerce.

Appellee could easily "adjust the movements of its motor vehicles to the requirements of the law." At the time this action was begun appellee had gasoline storage facilities at Caruthersville, Missouri, which is on the Mississippi River. The Memphis to St. Louis, St. Louis to Memphis, and Memphis to Carruthersville busses were refueled there (R. 6, 14, 49). The result was that the northbound busses on these routes could be supplied with fuel only sufficient to reach Caruthersville, 105.2 miles from Memphis. That trip could be made on 21 gallons of gasoline. Seventy-seven and nine-tenths miles of this route are in Arkansas, that mileage requiring 15.6 gallons of gasoline (R. 46). Appellee could put into the fuel tank of a bus at Memphis 30 gallons of gasoline, make the trip to Caruthersville with an ample reserve supply, and pay the tax on 10 gallons.

At some time after the suit was begun appellee discontinued refueling at Caruthersville and adopted the present arrangement (R. 49). This is solely for its own convenience. The result brought about by this change is commented upon at length by the Circuit Court of Appeals in describing appellee's operations between Memphis and St. Louis, which would indicate that the Court gave it some weight (101 F. 2d, p. 573, R. 69). Now if the evidence at the trial had showed that appellee was refueling at Caruthersville the Circuit Court of Appeals would not have had before it the evidence mainly referred to in its opinion. Assuredly the constitutionality of Arkansas statutes cannot be made to turn on the conduct of a carrier outside of

the State which in no way changes his use of the highways within the State.

We shall now show the changes that can be made in the table of computations, made a few pages before, based on refueling at Caruthersville. The changes will appear with respect to route (1), Memphis to St. Louis, and return, and route (3), Memphis to Caruthersville, Missouri, and return. In the second preceding paragraph we have considered only the tax arising from northbound traffic. The tax paid on gasoline carried by southbound busses would be less by a few gallons because it is 24.3 miles from Caruthersville to the State line. However, to avoid too extensive computations we shall use the northbound figures for all busses.

One trip one way on either route (1) or (3) under the preceding assumptions would cost appellee the tax on ten gallons, 65 cents. On a round trip on each route the tax would be $1.30. The round trip mileage in Arkansas on each route is 155.8, on which the tax on gasoline required for such Arkansas mileage would be $2.06.

We may therefore show how the above table would be changed on the basis of refueling at Caruthersville, Missouri:

| Route | Amount of tax which would be required on gasoline actually consumed in Arkansas. | Amount of tax which would be paid by appellee if it followed former practice of refueling at Caruthersville. |
|---|---|---|
| (1) | $2.06 | $1.30 |
| (2) | 1.86 | .98 |
| (3) | 2.06 | 1.30 |
| (4) | 1.82 | .98 |
| Total | $7.80 | $4.56 |

We think these illustrations unnecessary to sustain the statutes, but they do definitely establish that the 20 gallons exemption permits a motor vehicle operator to avoid excessive or duplicate gasoline tax payments to Arkansas.

C. There is, however, a further independent ground to sustain Act 67. It is admittedly within the power of the State to require gasoline taxes of motor vehicle users for the privilege of using the highways, even though engaged wholly in interstate commerce. The State could require a vehicle on an exclusively interstate trip to pay the tax upon the exact number of gallons used in the State. This, however, would involve a system of policing each individual vehicle as it entered and left the State, which would clearly run into excessive administrative costs. Instead of going to all that trouble, expense and risk of loss the State can employ a more simple and easily enforceable device even though it may work hardship in some cases. *Aero-Mayflower Transit Co. v. Georgia Public Service Commission, supra,* (295 U. S. 285, 289).

Such an easily administered device has been adopted by the State of Arkansas in the law requiring payment of the tax upon gasoline in excess of twenty gallons brought into the State in the fuel tanks of a motor vehicle. Laying aside at this point the proposition, obvious in itself, but fully demonstrated above, that a motor vehicle operator can "adjust the movements of its motor vehicles to the requirements of the law" so as to avoid payment of excess tax to the State of Arkansas, Act 67 can be sustained even though it may work a hardship in some cases by requiring the tax upon a larger quantity of gasoline than is actually used in the State. In that respect the Act lies within the

class of statutes sustained under the rule of *Purity Extract & Tonic Co.* v. *Lynch*, 226 U. S. 192, 201. There a law forbidding the sale of non-intoxicating malt liquors was sustained on the ground that it was a necessary measure, in the legislative judgment, to prevent evasion of the law forbidding the sale of intoxicating liquors. The Court said:

> "It does not follow that because a transaction, separately considered, is innocuous, it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the government."

In *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 388, this Court said, citing the *Purity Extract* case:

> "The inclusion of a reasonable margin to insure effective enforcement will not put upon a law, otherwise valid, the stamp of invalidity."

Thus Act 67 can be sustained as effecting a "reasonable margin to insure effective enforcement." This principle is applicable not only to the exercise of police power but also the taxing power. In *Milliken* v. *United States*, 283 U. S. 15, 24-25, this Court said:

> "Further, as an appropriate and indeed necessary measure to secure the effective administration of a system of death taxes, we think the present tax is to be supported as an incident and in aid of the exercise of the constitutional power to levy a tax on the transfer of the decedent's estate at death. See *Purity Extract & Tonic Co.* v. *Lynch*, 226 U. S. 192; *Jacob Ruppert* v. *Coffey*, 251 U. S. 264; *Lambert* v. *Yellowley*, 272 U. S. 581."

In *Burnet* v. *Wells*, 289 U. S. 670, 678, it is also said:

> "Even administrative convenience, the practical necessities of an efficient system of taxation, will have heed and recognition within reasonable limits."

This case also cites as authority for the foregoing *Purity Extract & Tonic Co.* v. *Lynch*, *supra*. See also the cases cited in footnote 1 of this brief.

The principle of a "reasonable margin to insure effective enforcement" is exemplified in the cases decided by this Court in which the Court has held valid substantial, lump sum, annual license fees as to an interstate motor vehicle operator who admittedly wanted to make only one, or a very few trips per year, into the State. Fees of that character are held valid as to such an operator even though persons making daily use of the State's highways pay the same fees and no more. *Hicklin* v. *Coney*, 290 U. S. 169; *Aero-Mayflower Transit Co.* v. *Georgia Public Service Commission*, *supra*, (295 U. S. 285); *Hendrick* v. *Maryland*, 235 U. S. 610; *Kane* v. *New Jersey*, 242 U. S. 160.

In view of these holdings it is assuredly competent for the State to base the amount of gasoline tax to be paid by an interstate motor vehicle operator upon the reasonable lump sum theory expressed in Act 67.

## III.

## THE REASONS ASSIGNED BY THE CIRCUIT COURT OF APPEALS FOR ITS DECISION ARE INSUFFICIENT TO OVERTHROW ACT 67 OF 1933.

A. The Circuit Court of Appeals assigned various reasons for its decision. The controlling one appears to be

expressed in the following statement, which is concluded by the Court's assertion "We think this case is ruled by *Interstate Transit, Inc.* v. *Lindsey, supra*" (283 U. S. 183). The Court's conclusions are plainly wrong and it is obvious that it utterly misunderstood *Interstate Transit, Inc.* v. *Lindsey.* The Court said (101 F. 2d, p. 574, R. 70):

> "Reduced to its lowest possible terms, the question for decision, we think, is whether the imposition of the tax upon gasoline carried for use in other States, in the fuel tank of a motor vehicle traveling in interstate commerce can be sustained.
>
> "That the tax is a direct burden on interstate commerce, cannot be controverted.
>
> "If it is to be sustained at all with respect to gasoline to be used in other States, it must be sustained upon the theory that the method employed for determining the amount of the tax constitutes a fair measure for ascertaining the compensation which lawfully may be exacted by Arkansas from the appellant for the use which it makes of the highways of the State. In *Interstate Transit, Inc.* v. *Lindsey*, 283 U. S. 183, the Supreme Court said (quoting from opinion):
>
> "While we can understand how the use of State highways by a carrier can be roughly measured by the amount of gasoline which that carrier uses to move its vehicles over the highways, we are unable to comprehend how the use of the highways of one State can appropriately be measured by the amount of gasoline carried in the fuel tank of an interstate carrier for use upon the highways of another State.
>
> "We think this case is ruled by *Interstate Transit, Inc.* v. *Lindsey, supra.* * * *"

Appellant feels that the court's conclusions are erroneous and are based upon a complete misconception of *Interstate Transit, Inc.* v. *Lindsey.*"

It is submitted that the Court's reasoning has been shown to be erroneous by the previous parts of this brief. (a) The Act in no sense constitutes "the imposition of the tax upon gasoline carried for use in other States." The purpose of the twenty gallons exemption is to permit a carrier to take through Arkansas a reasonable amount of gasoline free from the tax for use in other States. With that margin to work on the carrier can easily adjust its operations so that it pays to Arkansas no more than the tax on the gasoline it actually uses in Arkansas; in truth, it will usually pay less, as has been demonstrated above in our analysis of appellee's actual operations. (b) The Act does, under every standard fixed by decisions of this Court, constitute "a fair measure for ascertaining the compensation which lawfully may be exacted" for the use of the highways. The carrier is free to fill or re-fill its fuel tanks in such a way as to obtain precise mileage value of the use of the highways; just as this Court pointed out in *Aero-Mayflower Transit Co.* v. *Georgia Public Service Commission*, 295 U. S. 285, 289, and in *Carley & Hamilton* v. *Snook*, 281 U. S. 66, 72, both discussed above, the carriers there were free by adjustment of the use of their vehicles to obtain full road use value for the taxes paid. But in the instant case the carrier can by much easier and much less adjustment obtain far more precise mileage value than could possibly be obtained in the two cases last cited. (c) The Act does not in any sense measure the value of the use of the Arkansas highways by the amount of the gasoline carried in the fuel tank for use in other States. Instead, by giving the twenty gallons exemption, the Act permits the motor vehicle operator to limit to his actual mileage in

the State the amount of tax he will pay for the use of the Arkansas highways.

B. The erroneous conclusions in the portion of the opinion set out above apparently were induced, in part at least, by the Court's misunderstanding of *Interstate Transit, Inc.* v. *Lindsey, supra* (283 U. S. 183). In the first place, the *Lindsey* case is not in point here at all in view of the decision of the Supreme Court of Arkansas in *Sparling* v. *Refunding Board, supra* (189 Ark. 189, 71 S. W. 2d 182), that Act 11 of 1934 requires a tax for the privilege of using the highways. All the *Lindsey* case holds is that before a tax can be validly required of an interstate motor vehicle operator it must appear in some way that such tax is required for the privilege of using the highways or for administering the highway and traffic laws.

In the second place, the Court misapplied it. The Court thought the *Lindsey* case requires a State law imposing taxes on interstate motor carriers to be based with some nicety on the amount of actual use which such carriers make of the highways. The case plainly does not hold that. The tax was held invalid in *Interstate Transit, Inc.* v. *Lindsey*, only because it did not possess a single attribute of a charge for the privilege of using the highways. If it had possessed any one such attribute the opinion in that case and later decisions of this Court indicate that it would have been held valid. That is, if the proceeds had been dedicated to highway use it would have been held valid regardless of the fact that it was an annual, lump-sum tax and that its amount was not determined by the mileage traveled. *Hicklin* v. *Coxey*, 290 U. S. 169, 173. But even if the proceeds had not been devoted to the highways it would have

been sustained, regardless of its lump-sum nature, if it had possessed some other characteristic of a charge for the privilege of using the highways. *Morf* v. *Bingaman*, 298 U. S. 407, 412.

Because of the extreme emphasis the Circuit Court of Appeals placed on the *Lindsey* case, and because of its clear misunderstanding of the case, we desire, although at the rather plain risk of redundancy in argument, to analyze the case fully. The *Lindsey* case involved a Tennessee statute which imposed privilege taxes on every business in the state, 160 different kinds of businesses in all. The particular privilege tax complained of was one imposed upon the business of operating motor busses, assessing $500 per bus for the complainant's busses. This Court's opinion points that out with care (pp. 186-187) and further points out that the statute was not physically or otherwise a part of the law of the state which related to raising funds for highway purposes (p. 188), and that the revenue obtained by the statute did not go into the highway fund but into the general fund (p. 189), and that payment of the tax was not a prerequisite to the use of the highways. The Court therefore found that the tax did not possess any attribute showing it to be a charge exacted for the privilege of using the highways (which would have been valid), but found that the tax was simply a part of a general tax plan of the state laying privilege taxes upon *all businesses*, which could not be required of one engaging wholly in interstate commerce.

However, the Court further examined the tax (apparently at the urging of counsel, p. 190) to determine whether it bore any possible earmark to show that it was a fee for

the privilege of using the highways as contrasted with a charge upon the business of engaging in interstate commerce, and that is where this court employed the language relied on by the Circuit Court of Appeals. It is clear that when the Supreme Court stated that the fee was a flat fee and was not proportioned to the use it was not stating that *proportioning the tax to the use* is a necessary requisite of validity when applied to interstate motor vehicle taxes, but that it was only pointing out that the act did not possess even that one attribute to show that it was a charge for the privilege of using the highways. A careful reading of the Court's opinion shows that it is simply a progressive search to determine whether the tax possessed any one characteristic to show that it was a tax for the privilege of using the highways. And it is evident from the opinion and from later opinions which cite the case that had the tax possessed any one attribute showing it to be a tax for the privilege of using the highways the Court would have held it valid regardless of its flat fee nature; that is, if the proceeds had been devoted to highway use, or if payment had been a prerequisite to the use of the highways, the tax would have been held valid.

In the *Lindsey* case itself the Court pointed out that whether a tax is valid tax for the privilege of using the highways may be determined as follows (p. 186):

> "This may be indicated by the nature of the imposition, such as a mileage tax directly proportioned to the use, *Interstate Busses Corp.* v. *Blodgett*, 276 U. S. 245, or by the express allocation of the proceeds of the tax to highway purposes, *or* otherwise." (Emphasis supplied.)

Note that these indicia, including proportionment to the extent of the use, are stated in the alternative. So the reason the tax was held invalid in *Lindsey* case was not because it was not proportioned to the extent of the use, but *was* because it lacked *any* of the indicia of a tax for the privilege of using the highways.

The foregoing, plain in the opinion in *Interstate Transit, Inc.* v. *Lindsey*, itself was expressly pointed out in two later cases, both involving flat, substantial fees not proportioned to the use, *Hicklin* v. *Coney*, *supra* (290 U. S. 169), and *Morf* v. *Bingaman*, *supra* (298 U. S. 407). The same principle was stated in *Aero Mayflower Transit Co.* v. *Georgia Public Service Comm.*, *supra*, (295 U. S. 285).

In *Hicklin* v. *Coney* a statute imposing a flat, unvarying license fee as high as $400 per year for one vehicle was held valid as to interstate motor carriers making irregular trips into the state. The amount of the fee was based solely on "carrying capacity," the annual fee for a truck with a carrying capacity of five tons being $400.[a] The complainant cited as authority for the invalidity of the fee *Interstate Transit, Inc.* v. *Lindsey* and made the same argument the Circuit Court of Appeals uses; that is,

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[a] The statute is set out in full in the opinion of the Supreme Court of South Carolina in *State* v. *Hicklin*, 168 S. C. 440, 167 S. E. 674, which was affirmed by the Supreme Court in *Hicklin* v. *Coney*, *supra*, as follows:

"With regard to holders of certificate 'F' to which class the respondents herein belong, section 8512 provides: For vehicles of carrying capacity of not over one and one-half tons, thirty ($30.00) dollars; for vehicles of carrying capacity of over one and one-half tons and not over two tons, sixty ($60.00) dollars; for vehicles of carrying capacity of two tons and not over three tons, one hundred twenty ($120.00) dollars; for vehicles of carrying capacity of over three tons and not over four tons, two hundred ($200.00) dollars; for vehicles of carrying capacity of four tons and not over five tons, four hundred ($400.00) dollars; for vehicles equipped fully with pneumatic tires; for vehicles equipped fully or partially with solid tires these fees shall be doubled."

that since the fees were not proportioned to the use they were invalid (see briefs of counsel in 78 L. Ed. 247). This Court held against complainant's argument and pointed out that complainant's understanding of *Interstate Transit, Inc.* v. *Lindsey* was erroneous, saying (290 U. S. 169, 173):

> "Appellant insists that an undue burden is placed upon interstate commerce because the license fees are based on the 'carrying capacity' of the vehicles. The state court held that the fees 'are collected, as provided for by Section 8517, for the purpose of maintaining the public highways over which such motor vehicles shall operate, as compensation for their use.' The statute provides for the segregation, for this purpose, of the moneys collected. See *Clark* v. *Poor*, 274 U. S. 554, 555-557. *In this view the fees are not open to the objection raised in Interstate Transit, Inc.* v. *Lindsey*, 283 U. S. 183, 186, 188. Carrying capacity, the size and weight of trucks, unquestionably have a direct relation to the wear and hazards of the highways." (Emphasis supplied.)

There the Court points out clearly that a flat fee, substantial in amount, as was the fee in *Interstate Transit, Inc.* v. *Lindsey*, is nevertheless valid as to interstate carriers *if the proceeds are devoted to highway use.* That is, the fee is valid if it has *one* attribute showing it is exacted for the privilege of using the highways even though it may lack all other attributes to show that character. The trouble with the statute in *Interstate Transit, Inc.* v. *Lindsey*, was that it did not have even one attribute of a highway use license tax.

The foregoing principle was again expressly stated in *Morf* v. *Bingaman, supra* (298 U. S. 407). The statute in that case imposed a flat fee regardless of mileage or weight. The fee assessed was substantial because it was

a charge levied for only one trip by a passenger automobile of not more than 166 miles. Thirty-five per cent of the proceeds were not devoted to any highway use. It was argued that since part of the proceeds were diverted to non-highway use, the tax was invalid as to interstate carriers. *Interstate Transit* v. *Lindsey* was relied upon as authority for that proposition. The Court pointed out, however, that since the fee had *one* attribute of a highway use tax (payment of the fee as a prerequisite to the use) it was valid without any other attributes. The Court said (p. 412):

> "As the tax is not on the use of the highways but on the privilege of using them, without specific limitation as to mileage, the levy of a flat fee not shown to be unreasonable in amount, rather than of a fee based on mileage, is not a forbidden burden on interstate commerce. * * *
>
> "The use for highway maintenance of a fee collected from automobile owners may be of significance, *when the point is otherwise in doubt*, to show that the fee is in fact laid for that purpose and is thus a charge for the privilege of using the highways. *Interstate Transit* v. *Lindsey*, 283 U. S. 183, *supra*. But where the manner of the levy, like that prescribed by the present statute definitely identifies it as a fee charged for the grant of the privilege it is immaterial whether the state places the fees collected in the pocket out of which it pays highway maintenance charges or in some other." (Emphasis supplied.)

C. In addition to those already discussed, the Court stated two other grounds for its decision, which will now be considered briefly. It said (101 F. 2d, p. 576, R. 73):

> "It (the statute) imposes a direct burden not only upon the interstate commerce done by the appellant in

the State of Arkansas, but also upon the interstate commerce which it carries on in other states. By taxing the means whereby a bus makes a through trip from Memphis to St. Louis, the state taxes gasoline which is merely transported through Arkansas for use in interstate commerce in Missouri."

The fallacy in that statement has already been made apparent in earlier parts of our brief. Whenever appellee, or any other motor vehicle operator, leaves the state without having refueled in the state, and with not more than twenty gallons of gasoline in its fuel tank, the State of Arkansas will not collect a tax on gasoline which is transported through the state for use in other states. There is assuredly nothing unreasonable in that. The motor vehicle operator is left free to manage his business in such a way as to avoid paying the Arkansas tax on gasoline which he will use in other states, and he is allowed the reasonable margin of twenty gallons for his calculations. As a means of requiring the operator to pay some tax without excessive administrative machinery and cost, the state is entitled to demand the tax on all gasoline in excess of twenty gallons when the vehicle enters the state; and the operator can control the amount of tax he pays by exercising the same simple degree of care that payers of every species of tax must observe in this day and time. *Curry* v. *McCanless*, 307 U. S. 357.

D. The Court further said (101 F. 2d P. 576, R. 74):

"Another consideration which militates against sustaining the sort of tax which Arkansas seeks to exact from the appellant here is that that would open the door to the cumulative taxation of the same gasoline by all states through which an interstate motor vehicle passes."

Obviously that would not be true unless the vehicle operator aggressively willed it to be so. A non-cooperative taxpayer can undoubtedly find many unnecessary burdens to shoulder if he looks for them, *Curry* v. *McCanless, supra,* but his enterprise in that respect will not build up a case for the unconstitutionality of the laws, *Aero-Mayflower Transit Co.* v. *Georgia Public Service Commission, supra,* (179 Ga. 431, 442; 176 S. E. 487, 493; aff. in 295 U. S. 285, 289). The Circuit Court of Appeals cites cases to the effect that state laws are unconstitutional burdens on interstate commerce where they are of a character to permit taxation of the same interest by all of the states. See *Western Live Stock* v. *Bureau of Revenue,* 303 U. S. 250 (although the tax there was held not to be the forbidden type). But such authorities are not in point here. They have to do with statutes where the taxpayer is powerless to prevent multiple state taxation, such as the taxation of the gross income from interstate commerce. The instant statute is of a different character because the taxpayer can accurately delimit his payments to the mileage traveled and the gallons consumed within the state. Compare *Western Live Stock* v. *Bureau of Revenue, supra,* p. 260.

We think *Western Live Stock* v. *Bureau of Internal Revenue* instead of being against us as the Circuit Court of Appeals seemed to think, answers, in a broad, general way, most of the arguments of appellee and the reasoning of the Court of Appeals. Much of such argument and reasoning is based on the alleged added expense and the claimed inconvenience to which Act 67 will put appellee. But in that case this Court said (p. 254):

> "It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from

their just share of the state tax burden even though it increases the cost of doing business. 'Even interstate business must pay its own way.' " (Citing cases.)

## IV.

We have been arguing this case as if there were no authority squarely in point to support Act 67. But we think that such authority exists in *Bingaman* v. *Golden Eagle Western Lines, supra,* 297 U. S. 626. We do not think the statement in that case, holding that the tax would have been valid if it were a tax for the privilege of using the highways, sinks to the level of dictum. The only controversial point exhibited in the opinion is the nature of the tax, whether it is a charge for the privilege of using the highways or otherwise. That inquiry was made necessary by the express determination of the Court that if the tax is exacted for the privilege of using the highways "the tax should be sustained," (p. 628). We understand that this Court will not undertake the interpretation of the meaning of a state statute if such inquiry is unnecessary; that is, unless the other factors in the case are all resolved in favor of the validity of the tax. They were so resolved in the *Golden Eagle* case. It is therefore submitted that under the authority of that case alone Act 67 should be sustained.

## CONCLUSION

For all of the foregoing reasons, which are summarized in the summary of argument on page 13 hereof, the judgment of the Circuit Court of Appeals for the Eighth Circuit should be reversed, and the judgment of the District Court for the Eastern District of Arkansas dismissing plaintiff's (appellee's) complaint should be affirmed.

Respectfully submitted,

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## APPENDIX A

Parts of Act XI of the Acts of the Second Extraordinary Session of the 49th General Assembly of Arkansas of 1934, p. 28.

A BILL for an Act to Be Entitled: "An Act to Refund Highway and toll Bridge Obligations of the State and Road Improvement District Obligations; to Provide for the Payment and/or Funding of Certificates Issued in Aid of Municipal Improvement Districts; to Provide for the Funding and/or Payment of Claims Against the State Highway Commission, and for Other Purposes."

SECTION 2. There is hereby created in the State Treasury an account to be known as the State Highway Fund.

The first charge upon the State Highway Fund shall be the cost of maintaining the State Highway system and the operation and maintenance of the Toll Bridges, and the Treasurer of State shall transfer from said State Highway Fund to the Highway Maintenance Fund 25% of the total amount credited to said State Highway Fund during any fiscal year, such credit to be not less than $166,666.00 monthly, and not more than $100,000.00 for each fiscal year may be appropriated for the operation and maintenance of said Toll bridges.

SECTION 22. Paragraph (c) of Section 1 of Act No. 63 of the General Assembly, approved February 25, 1931, is amended to read as follows:

"(c) There is hereby levied a privilege or excise tax of six and one-half cents on each gallon of motor vehicle fuel as defined in this Act, sold or used in this State or purchased for sale or use in this State."

SECTION 23. Paragraph (e) of Section 1 of Act No. 63 of the General Assembly, approved February 25, 1931, is amended to read as follows:

"(e) All net tax derived from motor vehicle fuel under the provisions of Paragraph (c) of this Act shall be divided: Ninety two point three per cent (92.3%) shall be deemed State Highway Revenue, and Seven point seven per cent (7.7%) shall be deemed County Highway Improvement Revenue, and shall be credited by the Treasurer of the State to the 'County Highway Fund.' Said County Highway Fund shall be segregated, set apart and placed in trust for the sole, separate and exclusive use of the several counties of this State to be apportioned under the existing laws, and the State expressly covenants that it will not permit the percentage herein allotted to the County Highway Fund to be reduced. Providing that the refund going to any County in the State having a bridge district where the bridge is across a navigable stream, as defined by the Department of Commerce of the United States Government and is located not less than seven miles from the County seat of said County, and constitutes a continuation of a State Highway, the funds going to the County under the terms of this Act shall be allotted to the Bridge Commission to be applied to the retirement of the Bridge District Bonds, and the County Treasurer shall pay such funds to the proper Trustee for such application. Provided further that this amendment does not apply to toll bridges. Provided that one-half of the refund going to any other county in this State other than the counties herein classified or in which the refund is controlled by any existing legislation shall be allotted to the Bridge Commission of any Bridge District where the bridge constructed by the district is across a navigable stream as defined by the Department of Commerce of the United States Government and constitutes a link in a State Highway, and where said bridge is situated not less than one mile from the County Seat.

SECTION 25. Section 2 of Act No. 63 of the General Assembly, approved February 25, 1931, is amended to read as follows:

"SECTION 2. The purpose of this Act is to provide for the payment and collection of an excise or privilege tax on the first sale of motor vehicle fuels when sold, or the use, when used in this State; double taxation is not intended. Motor vehicle fuel manufactured, produced or compounded in or imported into this State and subsequently sold for exportation, is not taxable.

"The tax herein levied is to be collected at the source in this State of the manufacturer or wholesaler when sales of any motor vehicle fuels are made, and when not sold in this State, then when first brought into this State for use herein.' Provided that notwithstanding any provision or provisions contained in this Act to the contrary, no person, firm or corporation who manufactures motor vehicle fuel in this State from crude oil and its derivatives shall be required to pay or collect the tax imposed by this Act on any such motor vehicle fuel that said person, firm or corporation sells and ships to the purchaser in a railway tank car. This provision, however, shall not relieve any person, firm or corporation from making reports to the Commissioner of Revenues showing the amount of motor vehicle fuel sold in railway tank cars, and the tax upon such motor vehicle fuel so shipped in railway tank cars shall be collected and paid by the person, firm or corporation which purchases the motor vehicle fuel which is shipped in a railway tank car."

SECTION 48. The state expressly covenants that so long as any of the obligations authorized by this Act are outstanding, it will not permit Section 23 of Act No. 65 of the General Assembly, approved February 28, 1929, or Section 24 of said Act, as amended by this Act, to be repealed, or amended, so as in any manner to reduce the revenue therein provided for; if a substitute fuel for motor vehicles or improvements in equipment, or a change in conditions shall reduce the

annual revenue from automobile licenses and fees and gasoline or motor vehicle fuel taxes below $8,537,000.00, it will amend Sections 23 and 24 of said Act, as so amended, so as to provide for a minimum annual revenue of $8,537,000.00 from such licenses, fees, and taxes; and, except as provided in this Act, it will not issue in the aggregate more State Highway obligations, including obligations authorized by this Act, or any other obligations secured wholly or in part by taxes on gasoline or motor vehicle fuel, or revenue collected from automobile licenses and fees, than can be fully paid, with the interest thereon, from a revenue of $8,537,000.00 a year.

